

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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UNITED STATES OF AMERICA, v. BENYIAHIA HEBBAR,	Plaintiff(s), Defendant(s).	Case No. 2:16-CR-328 JCM (GWF) ORDER
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Presently before the court is Magistrate Judge Foley's report and recommendation ("R&R"), recommending that defendant Benyiahia Hebbar's motion to dismiss (ECF No. 47) the indictment (ECF No. 18) be denied. (ECF No. 52). No objections have been filed, and the deadline for filing objections has passed. This court adopts the magistrate judge's recommendation and denies the motion to dismiss.

I. Facts

This case is about whether the Second Amendment right to keep and bear arms includes the right to keep and possess an unregistered machine gun.

On August 12, 2016, FBI agents arrested defendant Hebbar for possessing a machine gun not registered in National Firearms Registration and Transfer Record. (ECF No. 1 at 4).

On August 15, 2016, the government filed a criminal complaint charging Hebbar with possession of a machine gun in violation of 26 U.S.C. §§ 5861(d) and 5871. *Id.* at 1.

On November 9, 2016, a federal grand jury returned an indictment against Hebbar charging him with one count of unlawful receipt or possession of an unregistered firearm in violation of 26 U.S.C. §§ 5812, 5841, 5861(b) & (d), and 5871. (ECF No. 18).

1 On June 8, 2017, Hebbar filed a motion to dismiss count one of the indictment (ECF No.
2 47), to which the government filed a response (ECF No. 48). In the R&R, the magistrate judge
3 recommends denying Hebbar's motion. (ECF No. 52).

4 **II. Legal Standard**

5 This court "may accept, reject, or modify, in whole or in part, the findings or
6 recommendations made by the magistrate." 28 U.S.C. § 636(b)(1). Where a party timely objects
7 to a magistrate judge's report and recommendation, then the court is required to "make a de novo
8 determination of those portions of the [report and recommendation] to which objection is made."
9 28 U.S.C. § 636(b)(1).

10 Where a party fails to object, however, the court is not required to conduct "any review at
11 all . . . of any issue that is not the subject of an objection." *Thomas v. Arn*, 474 U.S. 140, 149
12 (1985). Indeed, the Ninth Circuit has recognized that a district court is not required to review a
13 magistrate judge's report and recommendation where no objections have been filed. *See United*
14 *States v. Reyna-Tapia*, 328 F.3d 1114 (9th Cir. 2003) (disregarding the standard of review
15 employed by the district court when reviewing a report and recommendation to which no
16 objections were made).

17 Nevertheless, the court finds it appropriate to engage in a *de novo* review to determine
18 whether to adopt the recommendation of the magistrate judge.

19 **III. Discussion**

20 Here, Hebbar moves for dismissal of count one of the indictment. (ECF No. 47). He argues
21 that the Second Amendment of the United States Constitution guarantees the right to possess a
22 machine gun for self-defense. *Id.* In support, Hebbar cites to the Supreme Court's holding in *Dist.*
23 *of Columbia v. Heller*, 554 U.S. 570 (2008). *Id.*

24 In response, the government argues that machine guns are "dangerous and unusual
25 weapons," to which the Second Amendment does not apply. (ECF No. 48 at 4). Further, the
26 government contends that "[Hebbar] is charged with receiving and possessing a firearm that was
27 not registered pursuant to the requirements of 26 U.S.C. § 5812." *Id.* at 6. The government argues
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1 that, in *Heller*, the Supreme Court held that laws regulating the commercial transfer of firearms
2 are constitutional. *Id.*

3 In the instant R&R, the magistrate judge recommends that defendant's motion to dismiss
4 be denied, finding Hebbar's "possession of an unregistered machine gun is not protected by the
5 Second Amendment." (ECF No. 52 at 2). This court agrees.

6 *A. Dangerous and unusual weapon*

7 The Second Amendment states that "the right of the people to keep and bear Arms, shall
8 not be infringed." U.S. CONST. amend. II. The right to keep and bear arms is "an individual right,"
9 but it is not unlimited: "the right [to bear arms is] not a right to keep and carry any weapon
10 whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 595, 626.

11 In particular, "the Second Amendment does not protect those weapons not typically
12 possessed by law-abiding citizens for lawful purposes." *Id.* at 625. A machine gun is a dangerous
13 and unusual weapon not typically possessed by law-abiding citizens for a lawful purpose. *United*
14 *States v. Henry*, 688 F.3d 637, 640 (9th Cir. 2012).

15 Hebbar does not have a Second Amendment right to receive and possess a fully automatic
16 Colt AR-15, 5.56 mm caliber rifle. It is a machine gun and a dangerous and unusual weapon.
17 (ECF No. 18); 26 U.S.C. § 5845(b). Therefore, as the magistrate judge noted, Hebbar's motion
18 does not provide grounds for dismissal of the indictment against him.

19 *B. Registration of a firearm*

20 Furthermore, Hebbar is not merely charged with possession of a machine gun; rather,
21 Hebbar is charged with possession of an unregistered machine gun. (*See* ECF No. 18). Pursuant
22 to 26 U.S.C. § 5861 subsections (b) and (c), it is unlawful for any person to receive or possess a
23 firearm transferred in violation of a provision of Chapter 26 and receive or possess an unregistered
24 firearm. 26 U.S.C. § 5861(b) & (c). It is well established that statutes requiring the registration
25 of a firearm, and making it unlawful for any person to possess or receive an unregistered firearm,
26 do not infringe on a person's Second Amendment right to keep and bear arms. *See United States*
27 *v. Tomlin*, 454 F.2d 176, 176 (9th Cir. 1972).

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Therefore, even if the Second Amendment did include the right to possess a dangerous and unusual weapon, Hebbar's charge would still stand because the Second Amendment does not protect the receipt or possession of an unregistered machine gun.

IV. Conclusion

Accordingly,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that Magistrate Judge Foley's report and recommendation (ECF No. 52) be, and the same hereby are, ADOPTED in its entirety.

IT IS FURTHER ORDERED that defendant Benyiahia Hebbar's motion to dismiss (ECF No. 47) be, and the same hereby is, DENIED.

10 DATED August 18, 2017.

Xenos C. Mahan
UNITED STATES DISTRICT JUDGE